Supreme Court, U. S.
FILED
MAR 22 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6232

RAY L. WHITE,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

RESPONDENT'S BRIEF IN OPPOSITION

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Attorneys for Respondent

STATEMENT OF FACTS

Petitioner Ray L. White initially filed an original petition for special action in the Supreme Court of the State of Arizona. He filed as an indigent and was not represented by an attorney. White's State Court petition did not purport to invoke any particular state jurisdictional authority. However, it is apparent that White proceeded under 17A, Arizona Revised Statutes, Special Actions, Rules of Procedures. The Arizona Attorney General on behalf of the State of Arizona filed a response to White's petition for special action in which the Attorney General asked the State Supreme Court to dismiss the petition.

On 31 January 1979, the Arizona Supreme Court entered its order declining to accept jurisdiction of the petition for special action. White has filed no other suits before any Arizona Court raising the issues presented herein.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner invokes the jurisdiction of the United States Supreme Court pursuant to 28 U.S.C.A. § 1257.

28 U.S.C.A. § 1257 states in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * *
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> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

The jurisdictional prerequisite in this case, therefore, is a final judgment or decree from the highest court in Arizona. This court has stated in the past that it will not be bound by the

state's characterization of the finality of the judgment. Cole v. Violette, 319 U.S. 581 (1943); Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69 (1946). Also, the entire record may be reviewed to determine whether further proceedings may be had. Richfield Oil Corporation v. State Board of Equalization, supra; Local No. 438 Construction and General Laborer's Union v. Curry, 371 U.S. 542 (1963); Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 479 note 8 (1975). However, the requirement that there be a final judgment or decree has been consistently upheld. Richfield Oil Corporation v. State Board of Equalization; Local No. 438 Construction and General Laborer's Union v. Curry; Cox Broadcasting Corporation v. Cohn, supra.

There is no final Arizona judgment or decree in this case. The special action procedure in Arizona is the successor in both the trial and appellate courts to the old extraordinary writs of certiorari, mandamus and prohibition. 17A, Arizona Revised Statutes, Special Actions, Rules of Procedure, Rule 1 states in part:

> (a) Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule.

The Arizona Supreme Court has repeatedly held that when a matter is brought to it in an original petition for special action, it will exercise its discretion when deciding whether to grant the petition and thus consider the case on its merits. See Caruso v. Superior Court, 100 Ariz. 167, 412 P.2d 463 (1966); Jolly v. Superior Court, 112 Ariz. 186, 540 P.2d 658 (1975); Nataros v. Superior Court, 113 Ariz. 498, 557 P.2d 1057 (1976).

In this case the Arizona Supreme Court did not decide the case on the merits. On the contrary, it simply exercised

its discretion and decided not to consider the case on the merits. This does not mean that White was left without any remedy. The question presented in this petition makes it clear that White's underlying objective is to obtain a judgment to the effect that he was denied his right to due process of law at his parole release hearing. The Arizona appellate courts have held that this is an appropriate matter to bring before the Arizona trial courts [superior courts] and that this may be done through a petition for special action. See Foggy v. Arizona Board of Pardons and Paroles, 108 Ariz. 470, 501 P.2d 942 (1972); State ex rel., State Board of Pardons and Paroles v. Superior Court, 12 Ariz.App. 77, 467 P.2d 917 (1970). White could, therefore, have brought a petition for special action either in the Superior Court for Pinal County which was the county where he was confined or the Superior Court for Maricopa County where the Board of Pardons and Paroles has its offices.

The Arizona Supreme Court's decision not to accept the petition for special action in this case is not inconsistent with Foggy v. Arizona Board of Pardons and Paroles and State ex rel., State Board of Pardons and Paroles v. Superior Court, supra. Sound principles of judicial administration suggest that where, as in this case, there are issues of fact which must be resolved through testimony the better practice would be to have the case initially considered by a court organized to conduct trials on the facts. There is nothing, either in the Arizona Supreme Court's Order or in the general law of the State of Arizona which would preclude White from raising the issues addressed here in a petition for special action in an appropriate superior court.

It has been said that, "a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United

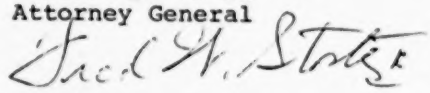
States, 324 U.S. 229, 233, (1945). The Arizona Supreme Court has not decided that White's rights have been adequately safeguarded under Arizona law and it has not decided that they have not been adequately safeguarded. Its decision is nothing more than a statement that White chose the wrong forum to initiate his suit. As such, the Arizona Supreme Court's Order is not a final judgment or decree as required by 28 U.S.C.A. 1257. This court, therefore, is without jurisdiction to grant the Writ of Certiorari.

CONCLUSION

For these reasons, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney General



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Assistant Attorney General

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STATE OF ARIZONA)
)ss.
County of Maricopa)

I hereby certify that on this 19th day of March 1979, three copies of Respondent's Brief in Opposition on Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona were mailed, postage prepaid, to Ray White, P.O. Box 837590, Florence, Arizona 85232, petitioner. I further certify that all parties required to be served have been served.

Fred W Stork

FRED W. STORK, III

SUBSCRIBED AND SWORN to before this 19th day of March 1979.

Debbie L Moore nee Schwark

NOTARY PUBLIC

My commission expires:

6-12-82